Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
CHIBARDUN TELEPHONE COOPERATIVE, INC.	)	CC Docket No. 97-219
CTC TELCOM, INC.	)	
	)	
Petition for Preemption Pursuant to Section 253 of the Communications Act of Discriminatory Ordinances, Fees and Right-of-Way Practices of the City of Rice Lake, Wisconsin	)	

TO: THE COMMISSION

COMMENTS OF CMMT COMMUNITIES

Colorado: City and County of Denver

Michigan: Cities of Detroit, Grand Rapids, Berkley, Birmingham, Grandville, Southfield, Sturgis, Walker, Wyoming, and Georgetown Charter Township

Minnesota: City of Albert Lea

Texas: Cities of Duncanville, Haltom City, University Park

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I. INTRODUCTION

CMMT Communities, by their attorneys, hereby file comments in the above-captioned proceeding with respect to the Petition for Section 253 Preemption filed on October 10, 1997 (the "Petition") by Chibardun Telephone Cooperative, Inc. ("Chibardun"), pursuant to the October 20, 1997 Public Notice, DA 97-2228, by the Federal Communications Commission ("FCC" or the "Commission").

CMMT Communities consist of franchising authorities in Colorado (City and County of Denver), Michigan (Cities of Detroit, Grand Rapids, Berkley, Birmingham, Grandville, Southfield, Sturgis, Walker, Wyoming, and Georgetown Charter Township), Minnesota (City of Albert Lea) and Texas (Cities of Duncanville, Haltom City, University Park).

CMMT Communities respectfully submit these comments on the Petition, and request that the Petition be denied for the following reasons:

First, Chibardun failed to properly bring this case in the appropriate forum -- i.e., local court. Section 253 of the Communications Act clearly requires Chibardun to seek judicial relief from alleged unreasonable right of way management and compensation requirements. The Commission lacks jurisdiction under Section 253(d) to preempt the right of way management and compensation activities of the City of Rice Lake, Wisconsin (the "City"). Second, the Commission is obligated to dismiss the Petition because the City, by Chibardun's own admission, has not prohibited Chibardun's ability to offer telecommunications services. The City offered Chibardun a license agreement which would permit Chibardun to provide telecommunications services. See Petition, at 10. Moreover, the issues raised in the Petition (by its own caption) relate to right of management and compensation rather than a prohibition on entry.

Third, the Petition's claims of discriminatory actions by the City vis a vis Marcus Cable and GTE are unsupported red herrings. Chibardun apparently desires unfettered free use of public rights of way and cites to discrimination as a means to achieve that result. Such a means and end result contravene not only Section 253 of the Communications Act, but also basic Constitutional principles.

Accordingly, CMMT Communities respectfully request that the Commission (1) reject Chibardun's attempt to subvert the local franchising process, and (2) deny the Petition for the reasons set forth herein.

II. THE COMMISSION LACKS JURISDICTION TO REVIEW LOCAL MANAGEMENT OF PUBLIC RIGHTS-OF-WAY OR COMPENSATION REQUIREMENTS FOR THE USE OF PUBLIC RIGHTS-OF-WAY

The Commission must deny Chibardun's Petition because it requests relief the Commission simply can not grant. Section 253(a) generally prohibits State or local regulation that may prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunication service. 47 U.S.C. § 253(c). Section 253(b) allows States to impose certain requirements "on a competitively neutral basis and consistent with section 254." Section 253(d) only authorizes the Commission to preempt the enforcement of regulations found to violate or be inconsistent with Sections 253(a) or (b), and then only to the extent necessary to correct the violation or inconsistency. 47 U.S.C. § 253(d).

Section 253(d), however, does not allow the Commission to preempt actions governed by Section 253(c). 47 U.S.C. § 253(d). Such disputes are to be resolved in local courts. Id. Section 253(c) states as follows:

> "Nothing in this section [253] affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." 47 U.S.C. § 253(c).

Hence, the Petition raises issues the Commission is barred by statute from addressing. A review of the issues Chibardun raises in the Petition demonstrate a connection solely to right of way management and compensation issues which should be raised under Section 253(c).

Chibardun points to six items which "no rational entity could consent to" and requests FCC preemption. Petition, at 15-17. Each of these six points, however, clearly involve right of way management or compensation. Further, many "rational entities" throughout the U.S. have agreed to abide by such provisions for many decades. Specifically, consider the following:

1. Chibardun objects to stating that it will comply with the City's future telecommunications ordinance. Telecommunication ordinances are an appropriate right of way management tool. Likewise, most ordinances are local laws of general applicability. Clearly, an entity must comply with a future ordinance, just as it must comply with a future statute passed by Congress. Local governments must be able to adapt their local laws to future circumstances.

2. Chibardun refuses to submit construction plans, schedules, and a list of contractors. Each of these items relates to right of way management and such a request is obviously not a prohibition on entry. A classic function of local governments is to coordinate construction and use of right of ways. A local government must know when, where, and how a user will be constructing its facilities in the rights of way. Simply put, when streets are being torn and holes are being dug, the City needs to know who is doing what, when, and where (and for how long). This is a typical and necessary right of way management function.

3. Chibardun objects to reimbursing the City's costs in connection with issuing a permit. Aside from being a compensation issue under Section 253(c), hardly any new telecommunications provider expects to use public rights of way for free. This would constitute either a subsidy of private users of public rights of way or, if required by the FCC (i.e., the Federal government), a taking of public property without adequate compensation therefor.

4. Chibardun refuses to indemnify the City and its related parties. Unquestionably, in the course of right of way management local governments are allowed to protect the public health, safety, and welfare. In carrying out this role, the City properly can require a private user of public rights of way to protect the City, the public, and others from the risks arising from such private use. This fundamental principle of right of way management is both reasonable and common.

5. Chibardun does not want the City to have the ability to require relocation or removal of facilities. Again, this is a right of way management issue. A typical provision in a cable franchise as well as other utility franchises and permits,

requires the provider to relocate or move its facilities when there is a public necessity (such as safety concerns, street reconstruction or other practical considerations).

6. Chibardun does not like the City's requirement that it be permitted to use Chibardun's conduits and poles upon request. This is both a compensation and right of way management issue. Such use of poles and conduits could be deemed compensation to the City for the use of public rights of way. In addition, public use of such poles and conduits is a right of way management issue from the perspective of avoiding duplicating poles and conduits in the right of way and thereby preventing overburdening such right of ways.

Chibardun is completely misguided in contending that the foregoing constitute a "redundant third tier of regulation." See Petition, at 20. Such requirements are not redundant -- the FCC certainly does not manage local rights of way with these necessary and classic right of management tools. Nor are such requirements a "third tier of regulation." Again, typically, neither States nor the FCC protect the public rights of way in such a fundamental manner. Indeed, the preceding items are strictly local right of way management and compensation issues which are neither unreasonable nor uncommon for providers in most communities.

But, Chibardun, goes even further and objects to eight so-called "onerous obligations" placed on it by the City:

1. Submission of Construction Plans and Schedules. This issue is dealt with above, and obviously is a right of way management issue.

2. Relocation and Movement of Poles and Conduits. Again, the preceding discussion addresses this right of way issue.

3. Use of Poles and Conduits. Also is noted above, this is both a right of way management and compensation issue.

4. Administrative Fee for Issuance of License. Clearly this item is a right of way compensation issue, relating to the City's costs.

5. Compliance with Future Laws. This item is discussed above and relates to the general obligation of complying with future ordinances as well as the ability, discussed below, of municipalities to adopt ordinances in the future dealing with differing circumstances.

6. Letter of Credit. A classic right of way management issue regarding the protection of the public health, safety, and welfare. This requirement also helps ensure restoration of the right of ways after use. Very few cable franchises and other utility franchises do not have some type of bond, letter of credit, or guaranty requirement.[1]

7. Indemnity. This is a clear right of way management issue discussed above regarding the public health, safety and welfare and ensures that a telecommunications provider is not placing undue risk on local government, the public, and taxpayers.

8. Insurance Obligations. This is a right of way management issue similar to an indemnity, which protects the public health, safety and welfare as well as public dollars from exposure due to private operations.

None of the preceding are irregular or unreasonable. Chibardun's discrimination claim is solely to "bootstrap" jurisdiction of the FCC under Section 253(d). Nevertheless, the plain language and legislative history of Section 253 irrefutably establish that Congress intended to and did deprive this Commission of any jurisdiction to hear the claims asserted by Chibardun. Local ordinances and requirements which relate to the control of public rights-of-way or compensation for the use of public rights-of-way are simply not subject to FCC review. Challenges to these local actions must be brought in local courts, not before the FCC.

[1]For example, the Michigan Telecommunications Act of 1995 expressly provides local governments with the ability to require telecommunications providers to post a bond. MCLA § 484.2251(3).

Indeed, the filing of this action by Chibardun has forced local units of government to incur the substantial burdens which Congress had intended to avoid. The Commission has no recourse but to follow the course set by Congress and reject Chibardun's claims due to a lack of jurisdiction.

III. CHIBARDUN'S DISCRIMINATION CLAIMS ARE A SUBTERFUGE TO AVOID LEGITIMATE LOCAL RIGHT OF WAY MANAGEMENT AND COMPENSATION

The Petition fails to support any allegation of discriminatory or competitively favored actions by the City. The Petition confuses excavation permits with franchise-type grants to construct and operate a telecommunications system. At every turn and opportunity, presumably to overcome the jurisdictional Section 253(d) defect of its Petition, Chibardun claims that the City is discriminating in favor of Marcus Cable and GTE. The Commission must reject such an obvious tactic used in an attempt to overcome the Petition's plain jurisdictional problem.

Moreover, the so-called "onerous and discriminatory conditions" as described above in Section II are hardly such. Chibardun's self serving labels are merely an attempt to circumscribe the jurisdictional boundaries of Section 253(d). If the Commission were to grant the Petition and preempt the City's actions, then any telecommunications provider could cite to local right of way management provisions, however reasonable or common, and seek to avoid such requirements on that basis.

IV. CHIBARDUN ADMITS THE CITY HAS NOT PREVENTED IT FROM PROVIDING TELECOMMUNICATIONS SERVICES

On its face, the Petition asks the Commission to preempt the City's right of way

management and compensation requests -- which are directly under the plain language and intent of Section 253(c). Further, the Petition concedes that the City has not prohibited Chibardun from providing telecommunications service. Indeed, the Petition notes that the City offered Chibardun a license to provide telecommunication services in the City. Petition, at 10. Hence, this case does not involve any real prohibition on entry.

V. LOCAL UNITS OF GOVERNMENT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT IN PUBLIC RIGHTS-OF-WAY WHICH HAVE NOT BEEN ACQUIRED BY THE 1996 ACT

The public rights-of-way which Chibardun seeks to use for free are the property of the State of Wisconsin and/or the City. Local units of government have the right and the power to regulate the use of their rights-of-way. The Federal government -- including this Commission -- has no authority to take these rights-of-way and give them to Chibardun for the laying of facilities, unless the Federal government provides just compensation. U.S. Constitution, Fifth Amendment; *United States v. Carmack,* 329 U.S. 230, 242; 67 S.Ct. 252, 257; 91 L.Ed. 209 (1946).

Nothing in the 1996 Telecommunications Act or its legislative history suggests that its purpose was to take rights-of-way by eminent domain and give them to private entities such as Chibardun. To the contrary, the 1996 Act acknowledges local units of governments' right to compensation for the use of rights-of-way and explicitly acknowledges the property rights of local units of government in rights-of-way. Section 253(c) provides:

> "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and

> nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." 47 U.S.C. § 253(c).

Section 253(c) preserves in local units of government the power to manage rights-of-way through local regulation. Further, Section 253(c) recognizes that local units of government have a right to compensation for the use of public rights-of-way.

The 1996 Act imposes the burden of compensating local units of government for the use of public rights-of-way on those who desire to use the rights-of-way. Chibardun incorrectly attempts to turn Section 253 (which allows the preemption of certain prohibitions on providing telecommunications service) into a grant of eminent domain authority. This is apparent from Chibardun's request that the Commission, in effect, rule that the City cannot assess a fee to recover its costs, much less charge reasonable compensation for use of the public rights of way.

Assuming, *arguendo*, that Congress presumably could grant the right of condemnation or eminent domain to this Commission in order to give public rights-of-way to Chibardun, when Congress grants such a right, it clearly says so, which it did not do here. The authority to condemn can only be granted expressly and not by implication or construction, as Chibardun is suggesting in this case under the guise of discriminatory treatment.

> "A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication; . . . The person or body claiming the right to exercise such delegated power must be able to point to the statute which either expressly or by necessary implication confers that right. Authority cannot be implied by or inferred from vague or doubtful language; when the matter is doubtful it must be resolved in favor of the property owner." 26 Am Jur 2d, Eminent Domain § 20.

The fact that Congress in Section 253 in no way used language remotely suggesting that the Commission has the power of eminent domain or condemnation shows that Congress did not intend to grant such powers.

The legislative history of Section 253(c) evidences the intent of Congress to preserve local control of rights-of-way. Representative Barton stated, for example:

> "I want to give a special thought on the local control of the right-of-way. . . I would urge all Members who have had some concerns expressed by their mayors to be supportive. We have worked out language in the bill and in the conference report that gives cities absolute guarantees to control their rights-of-way and to charge fair and reasonable nondiscriminatory pricing for the use of that right-of-way." 142 Cong. Rec. H11600 (February 1, 1996) (statement of Rep. Barton).

Thus, it was not the intent of Congress to usurp local control of rights-of-way or infringe the constitutionally protected interests of local units of government in rights-of-way. The 1996 Act guarantees local units of government continued control of their rights-of-way.

If Chibardun's contentions were correct, Section 253 would have the effect of taking local rights-of-way without just compensation in violation of the Fifth Amendment. It is axiomatic that statutes should be construed to avoid constitutional violations. Thus, standard rules of statutory construction negate Chibardun's contention.

VI. CONCLUSION

In light of the foregoing, the Commission must deny the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nikki Klungle, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 2nd day of December, 1997, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

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